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No. 87-100

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN J. LYNCH and JOSEPH S. RIGHT, SR., individually and on behalf of those similarly situated,

Appellants,

vs.

CITY OF CHICAGO, a municipal corporation; HAROLD WASHINGTON, Mayor of the City of Chicago; CECIL A. PARTEE, Treasurer of the City of Chicago; and WALTER K. KNORR, Comptroller of the City of Chicago,

Appellees.

On Appeal From The Appellate Court Of Illinois

MOTION TO DISMISS OR AFFIRM

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The appellees in the above-entitled case move the Court to dismiss this appeal or, in the alternative, to affirm the judgment of the Appellate Court of Illinois on the ground that the questions presented are so insubstantial as not to need further argument.

ORDINANCE INVOLVED

The Chicago Boat Mooring Tax Ordinance provides in pertinent part:

> "200.8-2.A. A tax is hereby imposed upon any watercraft moored or docked for a fee in any harbor, river or other body of water within the corporate limits or jurisdiction of the City of Chicago, at a rate of 50% of such mooring or docking fee.
>
> * * *
>
> 200.8-6.B. The tax imposed herein shall not apply to any watercraft, its owner, operator or person in possession to the extent the imposition of this tax upon such would violate the Constitution of the United States or the State of Illinois.
>
> * * *
>
> 200.8-1.A. Mooring or docking fee: The term mooring or docking fee or any similar term shall mean the consideration paid for the mooring or docking or the right to the mooring or docking of any watercraft, valued in money, whether received in money or otherwise, determined without any deductions whatsoever, but not including any consideration paid for the mooring or docking of a watercraft in the loading or unloading of goods or materials, or the board or unboarding of passengers, in the conduct of a business."

The full text of the Mooring Tax Ordinance is set forth in the Appendix to the Jurisdictional Statement at A-36.

STATEMENT OF FACTS

On December 27, 1983 the City Council of Chicago passed the Chicago Boat Mooring Tax Ordinance which imposes a tax on watercraft moored or docked for a fee in any harbor, river or other body of water within the corporate limits or jurisdiction of the City of Chicago. Appellants subsequently filed a class action complaint, claiming *inter alia* that the Chicago Boat Mooring Tax: (1) violates the Commerce Clause by imposing impermissible burdens on interstate commerce, the use of navigable waters and the right to travel freely from state to state; and (2) violates the Tonnage Clause by imposing an unlawful duty of tonage. As alleged in their complaint and contrary to their Statement of Facts (Jurisdictional Statement, p. 5), appellants are all owners of pleasure boats used for "recreational purposes" (C. 2).

On May 18, 1985, the Circuit Court of Cook County granted the City of Chicago's motion to dismiss the complaint for failure to state a cause of action. On November 26, 1986, the Appellate Court of Illinois affirmed the decision of the lower court, and on April 15, 1987, the Supreme Court of Illinois denied appellants' petition for leave to appeal.

ARGUMENT

THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT.

A. Appellants' Principal Argument That The Tax Is Unconstitutional Because No Facilities Or Services Are Conferred Upon Taxpayers For Paying The Tax Is Erroneously Based On A Standard Applicable Only To Fees.

Petitioners' contentions that the Chicago Boat Mooring Tax violates the Commerce and Tonnage Clauses are based on an erroneous premise: that the City must confer special benefits upon taxpayers as compensation for paying the tax. Appellants state that no special benefits are conferred upon taxpayers for paying the tax because the Chicago Park District, rather than the City of Chicago, provides all services and facilities to persons who moor boats in Chicago harbors; hence, they argue, the tax must fall.

To support their argument, appellants cite not a single tax case, but instead several irrelevant cases involving the imposition of fees. *Cf. Harmon v. Chicago*, 147 U.S. 396 (1893) (license fee to travel upon Chicago River); *Huse v. Glover*, 119 U.S. 543 (1886) (fee for use of locks); *Clyde Mallory Lines v. Alabama*, 296 U.S. 261 (1935) (harbor fees); *Evansville-Vanderburg Airport Authority v. Delta Airlines, Inc.*, 405 U.S. 707 (1972) (charge described as "user fee" in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981)).

Obviously, the critical distinction between this case and the authority relied on by appellants is that the Chicago Boat Mooring Tax is not a fee but a tax. There is no dispute that the Chicago Boat Mooring Tax is a tax upon a commercial transaction (*Lynch* appellant's brief in the Illinois appellate court, p. 11). Section 200.8-2.A of the Chi-

cago Boat Mooring Tax Ordinance provides for the imposition of a "tax" upon "any watercraft moored or docked for a fee". Section 200.8-5 requires the deposit of revenue derived from the Chicago Boat Mooring Tax into the general corporate fund of the City of Chicago.

It is well established that the validity of fees and general revenue taxes should not be tested by the same standard. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621 (1981). Although special benefits or services may be required as compensation for imposing a fee, there is no similar requirement for levying a tax. *Id.* at 621. In *Commonwealth Edison Co.*, this Court explained that the only benefit to which a taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. *Accord Korsis v. Chicago Park District*, 362 Ill. 24, 41 (1935) (municipal expenditures may properly benefit some taxpayers without benefitting others).

This principle has been consistently adhered to even when the taxed activity has a connection with interstate commerce or navigable waters. *See New York ex rel. Cornell Steamboat Co. v. Sohmer*, 235 U.S. 555 (1915); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 622-23 (1981). The rationale for this principle is that the tax is not upon the navigation of the waters; it is upon a commercial transaction. *New York ex rel. Cornell Steamboat Co. v. Sohmer*, 235 U.S. 555 (1915).

For example, in an analogous case, *New York ex rel. Cornell Steamboat Co. v. Sohmer*, 235 U.S. 555 (1915), this Court upheld an excise tax upon gross corporate earnings derived from charges for towing upon navigable waters. No special facilities or benefits were provided as compensation for the tax. This Court held:

> [T]he charge is not upon the navigation of the river . . . While the State may not require a navigation license except in very exceptional cases, as for compensation for improvements which the State has made, a situation not present here, it may . . . enforce its usual and customary system of taxation without infractions of the superior authority and laws of the United States concerning the navigation of rivers.

Id. at 559-60. Thus, the Illinois appellate court's well-reasoned opinion fully comports with the established precedent of this Court. The petitioners have not, and cannot, cite any cases requiring special benefits to justify the imposition of a tax.

Moreover, appellants' argument must fail here because the City of Chicago does provide a benefit to persons subject to the Chicago Boat Mooring Tax. By statute, the City of Chicago is required to provide police protection services to the Chicago Park District. In *Chicago Park District v. City of Chicago*, 111 Ill. 2d 7, 14 (1986), a related case involving the Chicago Boat Mooring Tax, the Illinois Supreme Court held:

> [T]he city is required to (Ill. Rev. Stat. 1981, ch. 105, par. 333.7) and does provide police protection within the area of the harbors. The city is simply taxing an event that occurs within its boundaries and in an area for which it provides services.

These police services insure the safety and facility of movement of watercraft in Chicago's busy harbors.

There is clearly no merit to appellants' contention that the tax is invalid because the City provides no services or facilities. Appellants have thus failed to present a substantial federal question warranting review by this Court.

B. The Tax Does Not Violate The Commerce Clause Because It Expressly Exempts Interstate Commerce Activities And Appellants Use Their Boats Only For Recreational Purposes.

The Chicago Boat Mooring Tax does not violate the Commerce Clause for two additional reasons. First, the Chicago Boat Mooring Tax Ordinance contains a broad exclusion that encompasses all activity which might unlawfully burden interstate commerce. The ordinance exempts:

> any compensation paid for mooring or docking of a watercraft in the loading or unloading of goods or materials, or the boarding or unboarding of passengers, in the conduct of a business.

Municipal Code of the City of Chicago, sec. 200.8-1.A (1984). In addition, the ordinance expressly prohibits the imposition of the tax upon any constitutionally protected right. Municipal Code of the City of Chicago, sec. 200.8-1.A (1984). Because the Chicago Boat Mooring Tax contains an express exemption for interstate commerce activities, the tax does not violate the Commerce Clause. *New York ex rel. Cornell Steamboat Co. v. Sohmer*, 235 U.S. 555 (1915) (statute which expressly excluded earnings of an "interstate character" from the tax base did not violate the Commerce Clause).

Second, appellants allege in their complaint merely that they are owners of pleasure boats used for "recreational purposes" (C. 2). As appellants admittedly do not use their boats for commercial purposes, any claim regarding their constitutional rights in this respect should not be addressed by this Court.

C. The Tax Does Not Violate The Tonnage Clause Since It Does Not Violate The Commerce Clause.

Appellants concede, as they must, that duties of tonnage are not unlawful unless they impermissibly burden inter-

state commerce. (Jurisdictional Statement, p. 11) *Clyde Mallory Lines v. Alabama*, 296 U.S. 261 (1935). The Tonnage Clause was designed to prevent the indirect taxation of imports and exports by imposing a tax upon commercial vessels entering and leaving ports. In *Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 264 (1935), this Court stated:

> It seems clear that the prohibition against the imposition of any duty of tonnage was due to the desire of the Framers to supplement Art. I, §10, Clause 2, denying to the states power to lay duties on imports or exports. See *Steamship Co. v. Portwardens*, 6 Wall, 31, 35; *Packet Co. v. Keokuk*, 95 U.S. 80, 87, 88, by forbidding a corresponding tax on the privilege of access by vessels to the ports of a state, and to their doubts whether the commerce clause would accomplish that purpose. If the states had been left free to tax the privilege of access by vessels to their harbors, the prohibition against duties on imports and exports could have been nullified by taxing the vessels transporting the merchandise.

Likewise, in *Packet Co. v. Keokuk*, 95 U.S. 80, 85 (1877), this Court held:

> What was intended by the [Tonnage Clause] was to protect the freedom of commerce, and nothing more. The prohibition of a duty of tonnage should, therefore, be construed so as to carry out that intent. A mere adherence to the letter, without reference to the spirit and purpose may in this case mislead, as it has misled in other cases.

Accord, *Huse v. Glover*, 119 U.S. 543 (1886); *Inman Steamship Co. v. Tinker*, 94 U.S. 238 (1876).

In this case, the Chicago Boat Mooring Tax cannot be used as an indirect method of imposing an import or export tax upon the cargo of a vessel since Section 200.8-1.A expressly excludes from the tax base "any consideration paid for the mooring or docking of a watercraft in the loading or unloading of goods or materials, or the board-

ing or unboarding of passengers, in the conduct of a business."

Because the Chicago Boat Mooring Tax does not interfere with local trade, it does not infringe upon the Tonnage Clause, the constitutional safeguard against the indirect taxation of imports and exports. Thus, the Illinois appellate court's decision is firmly aligned with long-established precedent of this Court and does not present a substantial federal question warranting further review.

D. The Tax Does Not Restrict Travel Upon Navigable Waters Or Between The States.

Appellants mischaracterize the Illinois appellate court's decision as having held "that restricting access to mooring and docking facilities which adjoin a navigable waterway, by use of a Mooring Tax, does not restrict the use of such waterway or impede the flow of interstate commerce" (Jurisdictional Statement, pp. 9-10). The appellate court never said that the tax restricts access to mooring and docking facilities. To the contrary, the appellate court emphasized that the tax is on "a commercial transaction within the city, not upon the navigation of waters" (Opinion, p. 6). Because the tax is imposed only on the commercial transaction of renting a mooring facility, the tax neither restricts the use of the waterways nor impedes the free flow of interstate commerce.

The sole support offered by appellants for their contention that the tax does restrict the use of navigable waters is their statement that in "order to use navigable waters, one must also be able to use the adjoining mooring and docking facilities"[1] (Jurisdictional Statement, p.

[1] Appellants did not present this argument to the Illinois Appellate Court.

10). This statement simply is not true. The Chicago Boat Mooring Tax imposes no restraint upon movement on navigable waters because the tax is levied only on persons who choose to use the docking and mooring facilities provided by the Chicago Park District for their convenience (C. 83). Boat owners who purchase their own facilities or use ramp launchings or land storage facilities are not subject to the tax (C. 83).

Moreover, the failure to pay the Chicago Boat Mooring Tax will not prevent any boat owner from traveling in the mooring areas or on other waterways. The Chicago Boat Mooring Tax Ordinance does not require the Chicago Park District to refuse to issue a permit to use its facilities or to revoke an existing permit if a person refuses to pay the tax. The City of Chicago has no authority to impound boats or impede their movement in any way. Indeed, the sole method of enforcement available to the City under Section 200.8-2.B of the ordinance is to file a lawsuit to collect taxes due and owing. Consequently, the Chicago Boat Mooring Tax imposes no restrictions upon the freedom to navigate waterways.

Nor does the Chicago Boat Mooring Tax impermissibly restrict a citizen's right to travel freely from state to state as appellants contend. Their only support for that contention is *Evansville-Vanderburg Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707, 713-14 (1972), a case involving an unconstitutional "user fee" imposed upon all persons emplaning any commercial airline. *Evansville-Vanderburg*, however, is irrelevant to this case not only because, like so many of the other cases appellants cite, it involved a fee rather than a general revenue tax, but also because in this case persons may board or debark from boats in the Chicago harbors and leave or enter the City without charge.

In sum, each of appellants' theories falls short because the tax is nothing more than a general revenue-raising tax on a commercial transaction. As such, it is constitutional in all respects. Because the Illinois appellate court's well-reasoned opinion follows the settled precedent of this Court, no conflict exists between the decision sought to be reviewed and a decision of this Court. Therefore, this case presents no substantial federal question warranting review by this Court.

CONCLUSION

For the foregoing reasons, appellees submit that the questions upon which this case depends are so insubstantial as to require no further argument, and appellees respectfully move this Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the Appellate Court of Illinois.

Respectfully submitted,

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